SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

PROMISE PUBLIC SCHOOLS, INC., Petitioner/Plaintiff, vs. SAN JOSE UNIFIED SCHOOL DISTRICT; DOES 1-10, inclusive Respondents/Defendants.	Case No. 18-CV-340197 ORDER DENYING PETITION FOR WRIT OF MANDATE ORDER ON SUBMITTED MATTER

The hearing on the amended verified petition for writ of mandate and complaint for declaratory relief (Amended Petition) of petitioner and plaintiff Promise Public Schools, Inc. (Promise) came on for hearing before the Honorable Helen E. Williams on May 9, 2019, at 9:00 a.m. in Department 10. Sarah J. Kollman of Young, Minney & Corr LLP appeared for Promise. John R. Yeh of Burke, Williams & Sorenson, LLP appeared for respondent and defendant San Jose Unified School District (the District). The Court requested supplemental briefing on the issues of the proper standard of review and appropriate remedies should the Court decide to grant the petition in whole or in part. That briefing was filed, after which the matter was submitted for

decision. After reviewing the pleadings, the record, the points and authorities submitted, the arguments of counsel, and the applicable law, the Court denies the Amended Petition as follows:

I. *The Charter Schools Act and Proposition 39 Concerning Facilities*[1]

"The Legislature enacted the Charter Schools Act of 1992 (§ 47600 et seq.) 'to provide opportunities for teachers, parents, pupils, and community members to establish and maintain schools that operate independently from the existing school district structure.' (§ 47601.) 'Charter schools are public schools " 'free from most state laws pertaining uniquely to school districts.' " [Citation.] The freedom granted to charter schools is intended to promote choice and innovation, and to stimulate "competition within the public school system." ' [Citation.] Persons wishing to establish a charter school do so by submitting a petition for establishment to the governing board of a school district. The petition is signed by a specified percentage of either teachers or parents and provides detailed information about the school's proposed operations. [Citations.] After reviewing the petition and holding a public hearing on the matter, the governing board shall grant the petitioners a charter 'if it is satisfied that granting the charter is consistent with sound educational practice.' [Citation.] If the governing board denies the petition, the petitioners may submit the petition to the county board of education, and if the county board denies the petition, the petitioners may submit it to the state board of education. [Citation.]" (*Westchester Secondary Charter School v. Los Angeles Unified School District* (2015) 237 Cal.App.4th 1226, 1230 (*Westchester*).)

"Once established, charter schools have limited means of getting public funds to cover the cost of facilities. [Citation.] If they do not have enough funds to rent or build their own facilities, charter schools must often rely on facilities controlled by the school districts with which they compete. [Citation.] 'Before the adoption of Proposition 39, a charter school was entitled "to use, at no charge, facilities not currently being used by the school district for instructional or administrative purposes, or that have not been historically used for rental

[1] Proposition 39, embodied at Education Code section 47614, was approved by the voters in the general election in November 2000. Further unspecified statutory references are to the Education Code.

purposes." [Citation.] In other words, charter schools had access only to public school facilities that districts were not using.' [Citation.]" [¶] In November 2000, the voters approved Proposition 39, which changed how school districts must share facilities with charter schools. [Citations.] Proposition 39 amended section 47614 to reflect the people's intent 'that public school facilities ... be shared fairly among all public school pupils, including those in charter schools.' [Citation.] Section 47614 now provides in pertinent part: 'Each school district shall make available, to each charter school operating in the school district, facilities sufficient for the charter school to accommodate all of the charter school's in-district[2] students in conditions reasonably equivalent to those in which the students would be accommodated if they were attending other public schools of the district ... . The school district shall make reasonable efforts to provide the charter school with facilities near to where the charter school wishes to locate, and shall not move the charter school unnecessarily.' [Citation.]" (*Westchester, supra*, 237 Cal.App.4th at p. 1231, italics omitted.)

"To qualify for district facilities, a charter school 'shall provide the school district [in which it is operating] with a *reasonable projection* of the charter school's average daily classroom attendance by in-district students for the following year,' and the district '*shall* allocate facilities to the charter school for that following year based on this projection.' (§ 47614, subd. (b)(2), italics added.) If, during the 'following year,' the average daily attendance of the charter school is less than it projected, 'the charter school *shall* reimburse the district for over-allocated space at rates to be set by the State Board of Education.' (§ 47614, subd. (b)(2), [italics added].) A district may deny a facilities request if it based on a projection of fewer than 80 units of average daily classroom attendance for the year. (§ 47614, subd. (b)(4).)" (*Sequoia Union High School District v. Aurora Charter High School* (2003) 112 Cal.App.4th 185, 195 (*Sequoia*).)

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[2] " 'In-district' students are those who would be eligible to attend district schools by virtue of their living in the district. [Citation.] It is ... possible for a charter school to have more students than it has 'in-district' students, because a charter school may not refuse to admit someone who lives outside the district in which the school operates. [Citation.]" (*Ridgecrest Charter School v. Sierra Sands Unified School District* (2005) 130 Cal.App.4th 986, 995, fn. 8 (*Ridgecrest*).)

Critically for this case, "[t]he statute is silent as to any mechanism for calculating the 'reasonable projection' of in-district students, the evidentiary standard of proof for the projection, the procedure for the district to question the reasonableness of the projection, or the district's right to deny the request when the school's projection is for 80 or more units of average daily attendance." (*Sequoia, supra*, at p. 195.) But "[b]y modifying 'projection' with the adjective 'reasonable' (§ 47614, subd. (b)(2)), the statute necessarily implies the charter school must offer some explanation in its facilities request for the basis of its projection. However, the statute does not require the school to demonstrate arithmetical precision in its projection or provide the kind of documentary or testimonial evidence that would be admissible at a trial. Rather, the school is subsequently penalized if its projection was incorrect by having to reimburse the district for over-allocated space. (§ 47614, subd. (b)(2).)" (*Sequoia, supra*, 112 Cal.App.4th at pp. 195-196.)

Still, the implementing regulation (adopted after the operative events in *Sequoia*), California Code of Regulations, title 5, section 11969.9 (Reg. 11969.9), "provides the procedure by which a charter school applies to a school district annually for facilities, and the school district responds to such a facilities request. The … request must include, inter alia, a reasonable projection of its in-district students for the preceding year and the method by which the projection was derived. ([Reg.] 11969.9, subd. (c)(1).) The school district may object to any of the charter school's projections ([*id.* at] subd. (d)]), and the charter school may respond to those objections ([*id.* at] subd. (e)) within specified times." (*Bullis Charter School v. Los Altos School District* (2011) 200 Cal.App.4th 1022, 1042 (*Bullis*).)

Specifically, and as relevant here, Reg. 11969.9, subdivision (b) now requires a charter school's written facilities request to be timely submitted and to consist of "(A) *reasonable projections* of in-district and total ADA[3] and in-district and total classroom ADA, based on ADA claimed for apportionment, if any, in the fiscal year prior to the fiscal year in which the facilities request is made, adjusted for expected changes in enrollment in the forthcoming fiscal

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[3] "ADA is an acronym for average daily classroom attendance. (Cal. Code Regs., tit. 5, § 11969.2, subd. (a).)" (*Environmental Charter High School v. Centinela Valley Union High School Dist.* (2004) 122 Cal.App.4th 139, 147, fn. 4.)

year; (B) a *description of the methodology* for the projections; [and] (C) if relevant (i.e., when a charter school is not yet open ...), *documentation of the number of in-district students meaningfully interested* in attending the charter school that is *sufficient for the district to determine the reasonableness of the projection, but that need not be verifiable for precise arithmetical accuracy*; ... ." (Italics added.) Reg. 11969.9, subdivision (d) provides that the district, in turn, must "review the charter school's projections of in-district and total ADA and in-district and total classroom ADA and, [timely] express any objections in writing and state the projections the district considers reasonable. If the district does not express objections in writing and state its own projections by the deadline, the charter school's projections are no longer subject to challenge, and the school district shall base its offer of facilities on those projections." Reg. 11969.9 further provides for a continued and timely exchange between the charter school and the district concerning the charter school's projections and the district's objections on the path towards resolving the space, if any, to be offered to the charter school and whether the school will occupy that space.

II. *Pleaded and Other Relevant Facts Here*

This case arises out of the District's initial refusal to provide Promise with facilities for its charter school for the 2019-2020 school year under section 47614 et seq., commonly referenced as Proposition 39, in response to Promise's facilities request.[4] Promise filed its original petition for writ of mandate and complaint in this case for injunctive and declaratory relief in late December 2018. Approximately one week later, Promise filed the operative Amended Petition.

According to the allegations of the Amended Petition, Promise first submitted a petition to the District in April 2017 to establish a charter school to serve the student populations in downtown San Jose. The District denied Promise's charter petition, claiming it did not meet legal requirements. Promise appealed the denial to the State Board of Education (SBE).

[4] The Court is aware that the parties continued to engage in the regulated process concerning the District's provision of facilities for the 2019-2020 school year during this litigation, but is not aware of the outcome.

On October 31, 2017, Promise submitted a request to the District, asking it to make reasonably equivalent school facilities available for its incoming students for the 2018-2019 school year under Proposition 39. The District discounted and rejected Promise's enrollment projections and refused to make Promise an offer of school facilities for the 2018-2019 school year. Consequently, Promise filed a petition for writ of mandate asking the court to compel the District to make an offer of school facilities based on its enrollment projections (*Promise Public Schools, Inc. v. San Jose Unified School District*, case no. 18CV325491, prior petition).

In January 2018, the SBE approved Promise's charter petition, which permitted the school to open for the 2018-2019 school year. Six months later, the Court (Hon. Thang N. Barrett) granted Promise's prior petition and ordered the District to make Promise an offer of reasonably equivalent school facilities based on Promise's enrollment projections.[5]

The District later made preliminary and final offers of facilities to Promise for the 2018-2019 school year. Promise ultimately declined the District's final offer because the proffered facilities were perceived as too distant from its student population in downtown San Jose and the offer was made too late in the year for Promise to arrange for student transportation. "Rather than accept the District's belated offer of distant facilities, Promise chose instead to wait until Fall of 2018 to resubmit its request for [Proposition] 39 facilities."

On November 1, 2018, Promise submitted to the District via email (a series of five emails) a request for Proposition 39 facilities for the 2019-2020 school year (Request) based on a projected total enrollment of 210 students,[6] a projected in-district enrollment of 189 students, and

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[5] The court takes judicial notice of the court's dispositive ruling on the prior petition, which granted Promise's requested relief on the basis that the District's response to Promise's request for facilities for the 2018-2019 academic year was not according to law in that it was determined to have exceeded the scope of the District's proper review of the request under section 47614, subdivision (a) and the implementing Reg. 11969.9.

[6] In the Amended Petition, Promise states that its Request was based on a projected total enrollment of 206 students. This appears to be a typographical error. In the Request, which is attached to the Amended Petition as Exhibit 2, the projected total enrollment is 210 students, not 206 students. Notably, in its prior request for facilities submitted to the District on October 31, 2017, Promise's projected total enrollment was 206 students. It appears to the Court that Promise erroneously referred to the projected total enrollment number from its prior request for facilities when it meant to state that its Request was based on a projected total enrollment of 210 students.

a projected in-district ADA of 177.56. In its Request, Promise stated that its school would include transitional kindergarten, kindergarten, first grade, second grade, fifth grade, and sixth grade. The enrollment projections and number of in-district students were further broken down by these grade levels. The Request was supported by 137 Intent-to-Enroll forms, which allegedly represented 158 meaningfully interested, grade-eligible in-district students.[7] The forms were not in the format prescribed by the District in an effort to "standardize its process," which format had been previously provided to Promise. Instead, Promise used its own forms. Promise arrived at its ADA projection by applying an attendance rate of 94 percent to its enrollment projections. Promise used this rate because it had used it in its charter petition budget and the District had used the same rate to make its own attendance projections.

Later that same day of November 1, 2018, Promise submitted to the District via email a second and revised request "with a few minor adjustments" (Revised Request). Promise requested the District to "please use this version." The Revised Request contained a lower ADA projection of 168.26 instead of the initial 177.56. Promise delivered a hard copy of the Revised Request to the District later that day.[8]

The District then engaged in an evaluative process to assess the projected numbers and supporting documentation in Promise's Revised Request to determine the reasonableness of the projections and to formulate a response, as required by Reg. 11969.9.

On December 1, 2018, the District sent Promise a letter, responding to Promise's Revised Request. In its letter, the District stated that Promise had submitted Intent-to-Enroll forms on behalf of 187 students. The District indicated that it had reviewed the forms and determined that many were defective. Specifically, the District asserted that forms submitted for 51 students contained incomplete or incorrect grade submissions; forms submitted for 14 students contained

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[7] The Intent-to-Enroll forms submitted to the District as "Appendix 1" to Promise's Request are not attached to the Amended Petition as an exhibit. In the Request itself, Promise states that it received Intent-to-Enroll forms representing approximately 160 in-district students.

[8] The Amended Petition alleges that Promise's facilities request for 2019-2020 was submitted on October 31, 2018, not November 1st. The discrepancy is not relevant here because the Request, and Revised Request, were both timely in any event.

an incomplete or "non-San Jose Unified address"; it was "unable to verify" forms for 27 students "due to insufficient information"; and it was "unable to verify the appropriate age of" 23 transitional kindergarten and kindergarten students.[9] Once the forms submitted for these students were discounted, according to the District, there remained Intent-to-Enroll forms submitted on behalf of 72 in-district students for the 2019-2020 school year. Based on that number, the District counter-projected an in-district ADA of 68, which is below the minimum in-district ADA of 80 that triggers the District's legal duty to make an offer of facilities.

During December 2018, Promise provided more information to the District about its projection, including additional data about students who had filled out Intent-to-Enroll forms and a chart. Promise appeared to return to its initial in-district ADA projection of 177.56 based on "revalidation" despite its Revised Request that had lowed this number to 168.26. In its late December 2018 response to the District's letter,[10] Promise addressed the District's objections to its ADA projections, contending that the objections and the District's decision to reject the vast majority of the Intent-to-Enroll forms were unreasonable and unlawful. But the District refused to withdraw any of its objections or amend its ADA counter-projection, prompting Promise to immediately initiate this litigation.

Promise alleges that it "provided the District with Intent to Enroll forms representing at least 147, if not 158 meaningfully interested students, to support its in-District ADA projection of 177.56," which "is more than enough forms to demonstrate that its projections are reasonable … ." Promise further alleges in its Amended Petition that the District unlawfully discounted its enrollment projections below the threshold at which districts must make charter schools

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[9] Attached as Exhibit 4 to the Amended Petition is a list of "the Intent to Enroll forms [the District] 'rejected' and for which reason," which the District provided to Promise in response to a Public Records Act request.

[10] In the Amended Petition, Promise states that it responded to the District's objections on January 2, 2018. This appears to be a typographical error. The date of January 2, 2018, is clearly erroneous as the District's objections to the Request were not even sent until December 1, 2018. Moreover, Promise's response to the District's objections is attached to the Amended Petition as Exhibit 5, and it is dated December 28, 2018. Thus, it appears to the Court that Promise erroneously referred to January 2, 2018, when it intended to state that it responded to the District's objections on December 28, 2018.

preliminary offers of facilities, and that the District will deny it reasonably equivalent facilities sufficient for its projected in-district ADA of 177.56 based upon the District's unlawful in-district ADA counter-projection of 68.

As a result, Promise alleges, "[a]n actual controversy has arisen and now exists between Promise and the District. Promise contends that the District's objections and counter projections to [its] projection of in-district ADA are conclusory, unreasonable, insufficient, arbitrary, capricious, and unlawfully founded, and therefore may not be used as the basis to reduce [its] in-district ADA projections on which a preliminary offer of reasonably equivalent facilities must be based. The District, on the other hand, disputes these contentions and absent judicial action, will refuse to make Promise a preliminary offer of facilities as it is legally obliged to do."

Promise thus specifically alleges that the requested relief is warranted because it timely submitted its Request for Proposition 39 School facilities for the 2019-2020 school year to the District; the Request was based on a projected total enrollment of 210 students, a projected in-district enrollment of 189 students, and an ADA of in-district students of 177.56; and the Request "was supported by 137 Intent to Enroll forms, representing 158 meaningfully interested, grade-eligible in-District students." (Am. Pet., ¶ 25.) Promise further alleges that it "provided the District with Intent to Enroll forms representing at least 147, if not 158 meaningfully interested students, to support its in-District ADA projection of 177.56," which "is more than enough forms to demonstrate that its projections are reasonable." (Am. Pet., ¶ 6a.) Promise also alleges that the District unlawfully discounted its enrollment projections below the threshold at which districts must make charter schools preliminary offers of facilities, and the District will deny it reasonably equivalent facilities sufficient for its projected in-district ADA of 177.56 based upon the District's unlawful in-district ADA counter-projection of 68. (Am. Pet., ¶¶ 27-28 & 1a-6a.) Promise contends that because all of the District's objections were improper and "the December 1, 2018 deadline for objections [has] passed, District has waived any further objection and any right to make a reasonable counter projection, and Promise's in-District ADA projection of 177.56 must be the exclusive basis of District's preliminary and final offers of facilities for the 2019-2020 year." (Am. Pet., ¶ 7a.)

Accordingly, in the Amended Petition,[11] Promise seeks the following very specific relief based on the District's December 1, 2018 response to its Request(s) for facilities for the 2019-2020 school year: (1) a writ of mandate compelling the District to provide it with reasonably equivalent, contiguous, furnished, and equipped facilities in downtown San Jose *based on its projected in-district ADA of 177.56*; and (2) a declaration from the Court that the documentation submitted with its Request for Proposition 39 facilities for the 2019-2020 school year and the associated methodology *are sufficient to demonstrate that its projected in-District ADA of 177.56 is reasonable*, the District's objections and counter projections are improper and unreasonable as a matter of law, and the District must provide an offer of facilities *based on Promise's projected in-District ADA of 177.56.* Thus, in essence, Promise contends that because the District on December 1, 2018, failed to articulate any lawful objections to its Request, the District is required to base its offer of facilities on the projections set forth in Promise's Request under Reg. 11969.9, and the Court should so order.

III. *Governing Standard of Review*

Promise alleges that the District abused its discretion by its actions communicated in its December 1, 2018 letter, which asserted the District's objections to numerous Intent-to-Enroll forms and discounted those forms based on its objections. (See Am. Pet., p. 1:17-26 & ¶¶ 27-28, 1a-7a, 15a-16a, 25a, 27a.) The alleged abuse of discretion is thus rooted in the totality of the District's objections as being unreasonable, fallacious, baseless, and without any legal support. (*Ibid.*)

The parties debate the applicable standard of judicial review but relevant authorities are in agreement. A writ of mandate under Code of Civil Procedure section 1085 "may be issued to a public agency 'to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled … .' [Citation.] Traditional mandamus lies 'to correct abuses of discretion,

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[11] In the Amended Petition, Promise's request for relief in mandate is labeled as the first cause of action and its claim for declaratory relief is labeled as the second cause of action. But the declaratory relief cause of action is part and parcel to the mandate petition and Promise is not seeking additional relief through this cause of action. It is thus being litigated by both sides and adjudicated along with, and in the manner of, the petition, meaning this order is dispositive of both pleaded claims for relief.

and will lie to force a particular action by the [agency] when the law clearly establishes the petitioner's right to such action.' [Citation.]" (*Sequoia, supra*, 112 Cal.App.4th at p. 195.) It is warranted " 'to compel the performance of an act which the law specifically enjoin, as a duty resulting from an office, trust, or station.' [Citation.] ... More specifically, courts have recognized that traditional mandamus proceedings are appropriate to enforce a school district's obligations under Proposition 39. ([*Bullis, supra*, 200 Cal.App.4th] at p. 1036.)" (*Westchester, supra*, 237 Cal.App.4th at p. 1235.)

Although these authorities discuss traditional mandamus as being available to "correct an abuse of discretion," it is nonetheless "used only to compel the performance of a duty that is purely ministerial in character. [Citation.] The remedy may not be invoked to control an exercise of discretion, i.e., to compel an official to exercise discretion in a particular way. [Citation.] 'A ministerial act has been described as "an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his [or her] own judgment or opinion concerning such act's propriety or impropriety, when a given set of facts exists." [Citation.] On the other hand, discretion is the power conferred on public functionaries to act officially according to the dictates of their own judgment. [Citations.]' [Citation.]" (*Ridgecrest, supra,* 130 Cal.App.4th at pp. 1002-1003; see also *Bullis, supra*, 200 Cal.App.4th at pp. 1035-1038.) Where " ' "a statute or ordinance clearly defines the specific duties or course of conduct that a governing body must take, that course of conduct becomes mandatory and eliminates any element of discretion." [Citation.]' [Citations.]" (*Bullis, supra*, at pp. 1035-1036.) Discussing the obligations of a school district under section 47614 and Reg. 11969.9, the Court in *Ridgecrest* observed that the district "was obligated to follow the law ... but *how* it did that was largely a matter committed to its discretion." (*Ridgecrest, supra*, 130 Cal.App.4th at p. 1003, italics added.) Thus, although a court in traditional mandate proceedings may be reviewing an agency's ministerial act or discharge of a ministerial duty in compliance with law, how the agency meets that duty is still a matter within its discretion.

"Our high court has described [that] the appropriate level of judicial scrutiny of agency action ' " in any particular case is perhaps not susceptible of precise formulation, but lies

somewhere along a continuum with nonreviewability at one end and independent judgment at the other." [Citation.] Quasi-legislative administration decisions are properly placed at that point of the continuum at which judicial review is more deferential; ministerial and informal actions do not merit such deference, and therefore lie toward the opposite end of the continuum.' [Citation.]" (*Bullis, supra*, 200 Cal.App.4th at p. 1036.) "Courts exercise limited review in ordinary mandamus proceedings. They may not reweigh the evidence or substitute their judgment for that of the agency. They uphold an agency action unless it is arbitrary, capricious, lacking in evidentiary support, or was made without due regard for petitioner's rights. [Citations.] However, courts must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute. [Citation.]" (*Sequoia, supra,* 112 Cal.App.4th at p. 195.) At least where the evidence is not conflicted, as seems to be the case here, and the trial court is thus not making findings of fact, judicial review is de novo. (*Ibid.*; see also *Westchester, supra*, 237 Cal.App.4th at p. 1236; *Ridgecrest, supra*, 130 Cal.App.4th at pp. 1003, 1006; *Bullis, supra*, 200 Cal.App.4th at pp. 1036-1037.) Where, as here, a matter involves not disputes of material fact but "an interpretation of Proposition 39 and its implementing regulations" and their applicability to a charter's school's request for facilities, and a district's response, including "the propriety of the methodology employed by the" district, judicial review is de novo. (*Bullis, supra*, 200 Cal.App.4th at pp. 1037-1038.)

Given the allegations of the Amended Petition and the specific relief requested, the limited issue before the Court is whether the District's December 1, 2018 objections and its decision to discount numerous Intent-to-Enroll forms based on those objections, constituted a failure to discharge its ministerial duties under section 47614 and Reg. 11969.9, and thus an abuse of discretion.

IV. *Analysis*

The legal theory underlying Promise's Amended Petition is predicated on Reg. 11969.9, subdivision (d). As noted, that section states, "The school district shall review the charter school's projections of in-district and total ADA and in-district and total classroom ADA and, on

or before December 1, express any objections in writing and state the projections the district considers reasonable. If the district does not express objections in writing and state its own projections by the deadline, the charter school's projections are no longer subject to challenge, and the school district shall base its offer of facilities on those projections." In essence, Promise argues that because the District failed to articulate *any* lawful objections to its Request, the District is required to base its offer of facilities on the projections specifically set forth in that Request. But this argument is of questionable merit under the applicable standard of review because Promise's allegations are belied by the undisputed evidence before the Court, which demonstrates that the District did not fail to discharge its duty or abuse its discretion under the governing law in the totality of its objections asserted to Promise's Intent-to-Enroll forms.

A. *Promise Did Not Request Prop 39 Facilities Based on an ADA of 177.56*

First, despite the allegations of the Amended Petition, the evidence shows that Promise's Revised Request for facilities, which was submitted to the District by the November 1st deadline (see Reg. 11969.9, subd. (b) ["To receive facilities during a particular fiscal year, a charter school must submit a written facilities request to the school district on or before November 1 of the preceding fiscal year"]), was the operative and controlling request for facilities and it *did not* ask the District to provide facilities to Promise based on a projected in-district ADA of 177.56. Rather, Promise asked the District to provide it with facilities based on a projected in-district ADA of 168.26. (See Chang Dec., ¶¶ 2-4 & Exs. A-C.) In his second email to the District of November 1st, Anthony Johnson, the founder of Promise, stated, "Please see the attached revised Prop 39 Request (Email #1 of 5). I made a few minor adjustments. *Please use this version for your review*." Notably, the Revised Request states that Promise projects a total enrollment of 210 students, an in-district enrollment of 179 students, and an ADA of in-district students of 168.26 based on Intent-to-Enroll forms representing approximately 160 meaningfully interested students. Even assuming for the sake of argument that all of the District's objections to the submitted Intent-to-Enroll forms were improper such that the District effectively and as a matter of law failed to object to Promise's request for facilities, Promise would be entitled to an offer of facilities based only on the projections set forth in its Revised

Request—168.26. (See Reg. 11969.9, subd. (d).) Because Promise's Revised Request for facilities asked the District to provide facilities based on an in-district ADA of 168.26, Promise cannot establish, under any circumstance, that the District was obligated (i.e., had a ministerial duty) to make it an offer of facilities based on an ADA of 177.56. Consequently, Promise has not established that it is entitled to the specific relief it seeks.

Moving on from that, in its papers, Promise states that it provided the District with Intent-to-Enroll forms for 142 or 147 meaningfully interested students. (Mem. Ps & As, pp. 1:12-14, 5:28-6:2, 8:25-27, 15:5-9.) But Promise does not attempt to present any evidence or argument showing that Intent-to-Enroll forms for 142-147 students (or any number of students less than 158) is documentation that is sufficient for the District, or this Court, to determine that Promise's projection of an in-district ADA of 177.56 was reasonable such that it is entitled as a matter of law to an offer of facilities based on an in-district ADA of 177.56. (See *California School Boards Assn. v. State Board of Educ.* (2010) 191 Cal.App.4th 530, 564-565 [a charter school need only provide "documentation of the number of in-district students meaningfully interested in attending the charter school that is sufficient for the district to determine the reasonableness of the projection, but that need not be verifiable for precise mathematical accuracy"]; Reg. 11969.9, subd. (c)(1)(C) [same]; § 47614, subd. (b)(2) ["each charter school desiring facilities from a school district … shall provide the school district with a reasonable projection of the charter school's average daily classroom attendance by in-district students for the following year. The district shall allocate facilities to the charter school for that following year based on this projection"].) Both Promise's original Request and its Revised Request merely set forth methodologies that purport to show that its projected in-district ADA of 177.56 and 168.26, respectively, are reasonable because they are supported by Intent-to-Enroll forms for 158 meaningfully interested students. Neither Request establishes that Intent-to-Enroll forms for a (significantly) lesser number of students would support Promise's projected in-district ADA. And, although Anthony Johnson submitted a declaration in support of the Amended Petition, he does not opine that Promise's projected in-district ADA is sufficiently supported by Intent-to-Enroll forms for only 142 or 147 students. Nor does he assert that the methodologies set forth in

either of Promise's Requests apply equally even when there are Intent-to-Enroll forms for a number of meaningfully interested students that is less than 158. Nor does Promise argue to this effect.

And, as explained below, when the Intent-to-Enroll forms are inspected, it becomes apparent that there are not even a sufficient number for 142 or 147 meaningfully interested students. Instead, there are sufficient forms for only 98 students because the District's objections to Intent-to-Enroll forms for 89 students had merit. The Court would have to engage in speculation to determine whether Intent-to-Enroll forms for such a reduced number of students support Promise's projected in-district ADA figures. Consequently Promise has not shown that it is entitled to the specifically requested relief.

B. *The Majority Of The District's Objections Were Well Taken*

Second, the evidence shows that many of the District's objections were proper. With its moving papers, Promise presented evidence demonstrating that the District asserted objections to Intent-to-Enroll forms submitted for 115 students, and did not assert any objections to Intent-to-Enroll forms submitted for 72 students. (Johnson Dec., Exs. 6-7.) In its objection letter, the District asserted that it was right to discount the Intent-to-Enroll forms submitted for 115 students because: (1) the forms submitted for 51 students had "incomplete or incorrect grade submissions"; (2) the forms submitted for 14 students had "incomplete or non-San José Unified address submissions"; (3) the forms submitted for 27 students could not be "verif[ied] due to insufficient information"; and (4) the forms submitted for 23 "TK and K students" did not have sufficient information for the District to "verify the appropriate age of" the student. (*Ibid.*) Each student whose form was objected to was assigned a number by the District. (*Ibid.*) The student's number was then listed under a particular category of objections. (*Ibid.*)

1. *First Category of Objections*

On the first category of objections, Promise concedes that the District's objection was appropriate as to those Intent-to-Enroll forms submitted for students "who are going into 3rd or 4th grade [and who] are not eligible to enroll in Promise Academy in the Fall of 2019 because Promise Academy is not teaching 3rd or 4th grade in 2019-2020." (P's Mem. Ps. & As., pp.

12:26-13:2.) Upon review of the Intent-to-Enroll forms, 15 of the 51 students whose forms were objected to by the District were listed as "going into 3rd or 4th grade." (See Johnson Dec., Ex. 7, pp. 1-47, [the Intent-to-Enroll forms for Student Nos. 2, 8, 19, 22, 29, 44, 76, 96, 127, 130, 162, 166, 173, 176, & 183 provide that those students would be enrolling in third of fourth grade in the 2019-2020 school year].) Thus, the District's objection indisputably had merit as to 15 of the 51 students in this category.

Furthermore, the Intent-to-Enroll forms submitted for an additional eight of the 51 students demonstrate that those students would be enrolling in a grade not offered by Promise in the 2019-2020 school year. (See Johnson Dec., ¶ 24 [Promise's school would include transitional kindergarten, kindergarten, first grade, second grade, fifth grade, and sixth grade] & Ex. 7, pp. 1-47 [Student No. 6 listed as entering seventh grade in the 2019-2020 school year; Student No. 15 current grade listed as sixth grade and no grade is provided for the 2019-2020 school year; Student No. 27 listed as entering tenth grade in the 2019-2020 school year; Student No. 32 current grade listed as tenth grade and no grade is provided for the 2019-2020 school year; Student No. 36 current grade listed as seventh grade and no grade is provided for the 2019-2020 school year; Student No. 81 listed as entering eleventh grade in the 2019-2020 school year; Student No. 89 current grade listed as second grade and no grade is provided for the 2019-2020 school year; and Student No. 91 current grade listed as ninth grade and no grade is provided for the 2019-2020 school year.].) Thus, the District's objection was proper as to these eight additional students.

Further, the Intent-to-Enroll forms submitted for eight of the 51 students in this category did not contain any information about the student's current grade or the grade the student would be entering in the 2019-2020 school year. (See Johnson Dec., Ex. 7, pp. 1-47 [Student Nos. 33, 37, 39, 40, 84, 97, 107, & 108].) Because the District could not be expected to determine whether the student would be enrolling in a grade level offered by Promise during the 2019-2020 school year without this information, the District's objection was likewise well taken as to these eight additional students.

Next, the Intent-to-Enroll forms submitted for eight of the 51 students in this category state that the student's current grade is "pre-school" or "pre-k," and do not provide any further information about the student's grade level for the 2019-2020 school year. (See Johnson Dec., Ex. 7, pp. 1-47 [Student Nos. 41, 55, 80, 103, 104, 112, 139, & 140].) Similarly, the Intent-to-Enroll forms submitted for four of the 51 students state that the student's grade level for the 2019-2020 school year is "pre-school" or "pre-k," and do not provide any further information about the student's current grade level. (See Johnson Dec., Ex. 7, pp. 1-47, [Student Nos. 87, 100, 101, & 102].) This information—that the student's current grade is "pre-school" or "pre-k" or that the student's grade level for the 2019-2020 school year would be "pre-school" or "pre-k"—is insufficient for the District to determine whether the student would be enrolling in a grade level offered by Promise during the 2019-2020 school year. The term "pre-k" or "prekindergarten" generally or commonly means a "[d]ay care with some educational content for children younger than five, provided by elementary schools or preschools." (See Oxford English Dict., https://en.oxforddictionaries.com/definition/us/prekindergarten [as of May 6, 2019].) The term "preschool" generally means a "nursery school," which is "a school for young children, mainly between the ages of three and five." (See Oxford English Dict., https://en.oxforddictionaries.com/definition/us/preschool and https://en.oxforddictionaries.com/definition/us/nursery_school [as of May 6, 2019].) Given the broad, general, and commonly understood meaning of these terms, the District could not reasonably determine whether the students so described would be enrolling in a grade level offered by Promise during the 2019-2020 school year, such as transitional kindergarten or kindergarten. Thus, the District's objection had merit as to these 12 additional students. Although a student's birthdate is not generally required in order for the charter school's projection to be considered reasonable, in this particular category, additional information from which it could be determined whether the student was properly and legally slated for kindergarten or transitional kindergarten was relevant.

Finally, in this category, the Intent-to-Enroll forms submitted for five of the 51 students provide conflicting information about the student's then-current grade level and the student's grade level for the 2019-2020 school year such that the District could not be expected to

determine from the information provided whether the student would be enrolling in a grade level offered by Promise during the 2019-2020 school year. (See Johnson Dec., Ex. 7, pp. 1-47, [Student No. 42 current grade is listed as "pre-school" and grade level for the 2019-2020 school year is listed as first grade; Student No. 52 current grade and grade level for the 2019-2020 school year are both listed as sixth grade; Student No. 53 current grade and grade level for the 2019-2020 school year are both listed as second grade; Student No. 93 current grade and grade level for the 2019-2020 school year are both listed as "pre-k"; Student No. 115 current grade is listed as "entering TK" and grade level for the 2019-2020 school year is listed as "pre-school"].) Therefore, the District's objection was appropriate as to these five additional students.

In light of all this, the District's first category of objections was well taken as to 48 of the 51 students.

2. *Second Category of Objections*

With respect to the second category of objections, Promise expressly concedes that the District's objection to the Intent-to-Enroll forms submitted for four of the 14 students was appropriate. (P's Mem. Ps. & As., pp. 11:15-12:3; Johnson Dec., Ex. 7, pp. 54-55, 57, & 60 [Student Nos. 113, 118, 141, & 157].) Thus, the District's objection was indisputably proper as to these four of the 14 students.

Furthermore, the Intent-to-Enroll forms submitted for two of the 14 students in this category were incomplete because the forms do not provide the city and state for the student's address. (Johnson Dec., Ex. 7, p. 50 [Student Nos. 48-49].) Without this information, the District could not reasonably be expected to determine whether the student was residing within the District's boundaries. Therefore, the District's objection was proper as to these two additional students.

And the Intent-to-Enroll form submitted for one of the 14 students in this category was incomplete because a street number was not provided for the student's address. (Johnson Dec., Ex. 7, p. 56 [Student No. 121].) Promise's evidence demonstrates that less than half of the street numbers on the street in question are within the District's boundaries. (See Slabach Dec., ¶¶2, 5, & 7 ["The service indicated that Little Orchard Street is numbered 1424 through 2181, and that

street numbers 1424 through 1601 are inside the boundaries of the San Jose Unified School District, and street numbers 1655 through 2181 are outside its boundaries"].) Without the student's street number here, the District could not reasonably be expected to determine whether the student was residing within the District's boundaries. Thus, the District's objection had merit as to this student.

Finally, in this category, Promise does not present evidence establishing that the address provided on the Intent-to-Enroll form for another of the 14 students was an address within the District's boundaries. (Johnson Dec., Ex. 7, p. 49 [Student No. 20].) The address provided for that student was 890 Paul Street. (See *ibid.*) Promise's evidence merely demonstrates that a different address—890 Paul*a* Street—is within the District's boundaries. (See Slabach Dec., ¶¶ 2-4.) Consequently, Promise has not shown that the District's objection to the Intent-to-Enroll form submitted for this student was unwarranted or improper.

In light of this, the District's second category of objections was well taken as to eight of the 14 students.

3. *Third Category of Objections*

On the third category of objections, the Intent-to-Enroll forms for two of the 27 students was incomplete because the forms did not provide the last name of the student or the student's address. (Johnson Dec., Ex. 7, pp. 73 & 79 [Student Nos. 92 & 129].) Without this information, the District could not reasonably be expected to determine whether the student was residing within the District's boundaries. Thus, the District's objection was appropriate as to these two students.

Similarly, the Intent-to-Enroll form for one of the 27 students was incomplete because the form did not provide the last name of the student or the city and state for the student's address. (Johnson Dec., Ex. 7, p. 77 [Student No. 122].) Without this information, the District could not be expected to determine whether the student was residing within the District's boundaries. Thus, the District's objection was also proper as to this student.

Further, the Intent-to-Enroll forms submitted for four of the 27 students in this category were incomplete because the student's address was not provided. (Johnson Dec., Ex. 7, pp. 69,

72, 75, & 83 [Student Nos. 74, 83, 98, & 165].) Without this information, the District could not reasonably be expected to determine whether the student was residing within the District's boundaries. Therefore, the District's objection was well taken as to these four additional students.

And the Intent-to-Enroll forms submitted for three of the 27 students in this category were incomplete because the forms do not provide the city and state for the student's address. (Johnson Dec., Ex. 7, pp. 63, 74, & 84 [Student Nos. 3, 95, & 167].) Again, without this information, the District could not be expected to determine whether the student was residing within the District's boundaries. Therefore, the District's objection was proper as to these three students.

In light of this, the District's third category of objections had merit as to ten of the 27 students.

4. *Fourth Category of Objections*

With respect to the fourth category of objections, the District objected to the forms submitted for 23 students whose grade levels for the 2019-2020 school year were listed as transitional kindergarten or kindergarten because the Intent-to-Enroll forms did not provide the students' dates of birth. The question before the Court with respect to this category of objections is whether the District abused its discretion when it disregarded the Intent-to-Enroll forms for these 23 students on the basis of this omitted information.

The law requires Promise to "offer some explanation in its facilities request for the basis for its projection." (*Sequoia, supra,* 112 Cal.App.4th at pp. 195-196.) As noted, Promise's explanation need not "demonstrate arithmetical precision in its projection or provide the kind of documentary or testimonial evidence that would be admissible at a trial." (*Id.* at p. 196.) Promise need only provide "documentation of the number of in-District students meaningfully interested in attending the charter school that is sufficient for the district to determine the reasonableness of the projection, but that need not be verifiable for precise arithmetical accuracy." (*California School Boards Assn. v. State Bd. of Educ.* (2010) 191 Cal.App.4th 530, 564-565; Reg. 11969.9, subd. (c)(1)(C).)

As the District points out, the Education Code outlines various age requirements about transitional kindergarten and kindergarten. Specifically, section 48000, subdivision (a)(4) provides that "[a] child shall be admitted to a kindergarten maintained by the school district at the beginning of a school year, or at a later time in the same year, if the child will have his or her fifth birthday on or before one of the following dates: … September 1 of the 2014-15 school year and each school year thereafter."

Additionally, as relevant here, section 48000, subdivision (c) provides that, "[a]s a condition of receipt of apportionment for pupils in a transitional kindergarten program pursuant to Section 46300, and Chapter 3 (commencing with Section 47610) of Part 26.8, as applicable, a school district or charter school shall ensure the following": "(3)(A) In the 2014-15 school year and each school year thereafter, a child who will have his or her fifth birthday between September 2 and December 2 shall be admitted to a transitional kindergarten program maintained by the school district or charter school. (B)(i) For the 2015-16 school year and each school year thereafter, a school district or charter school may, at any time during a school year, admit a child to a transitional kindergarten program who will have his or her fifth birthday after December 2 but during that same school year, with the approval of the parent or guardian, subject to the following conditions: (I) The governing board of the school district or the governing body of the charter school determines that the admittance is in the best interests of the child. (II) The parent or guardian is given information regarding the advantages and disadvantages and any other explanatory information about the effect of this early admittance. (ii) Notwithstanding any other law, a pupil admitted to a transitional kindergarten program pursuant to clause (i) shall not generate average daily attendance for purposes of Section 46300, or be included in the enrollment or unduplicated pupil count pursuant to Section 42238.02, until the pupil has attained his or her fifth birthday, regardless of when the pupil was admitted during the school year."

In short, a student enrolling in kindergarten must turn five years of age no later than September 1 of the school in year in which the student is enrolling (see § 48000, subd. (a)) and a

student enrolling in transitional kindergarten must turn five years of age between September 2 and December 2 of the school year in which the student is enrolling (see § 48000, subd. (c)).

The District also offers evidence that because Promise did not provide it with the dates of birth for the 23 students whose grade levels for the 2019-2020 school year were listed as transitional kindergarten or kindergarten, it was unable to determine whether those students were eligible for these grade levels. (McMahon Dec., ¶ 12.)

Here, the District has shown that the date of birth of a student seeking to enroll in transitional kindergarten or kindergarten is a relevant factor when determining whether that student is eligible for those grades, and has demonstrated a rational connection between that factor and the choice made (i.e., to discount the forms because they did not provide the students' dates of birth). Without the students' dates of birth in this category, the District could not determine whether the 23 students were eligible for transitional kindergarten or kindergarten and, therefore, it could not determine whether Promise's projections were reasonable to the extent those projections were based on the Intent-to-Enroll forms for those 23 students. Accordingly, the District did not fail to discharge its duty or abuse its discretion when it discounted the forms submitted for 23 students whose grade levels for the 2019-2020 school year were listed as transitional kindergarten or kindergarten because the Intent-to-Enroll forms did not provide the students' dates of birth. (See *Environmental Charter High School v. Centinela Valley Union High School Dist.* (2004) 122 Cal.App.4th 139, 151 ["Our task is to ensure that [the district] has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute"].)

5. *Conclusion on All Categories of Objection*

Promise emphasizes repeatedly that it was not required to submit projections with arithmetical precision or provide the kind of documentary or testimonial evidence that would survive scrutiny at trial in order to be considered "reasonable" under the governing law. And it faults the District's efforts to independently "verify" the projections as beyond its permissible scope of review as dictated by Reg. 11969.9 in evaluating the reasonableness of the projections or formulating its objections to Intent-to-Enroll forms. But, as the Court sees it, and especially

because Promise's projections were something of a moving target, the District engaged in no more scrutiny than it was entitled to apply in the discharge of its duty to determine the reasonableness of the projections and formulate a reasonable response. In sum, the District objected to the Intent-to-Enroll forms submitted for 115 students and those objections appear to have been well taken as to 89 of those students. The District's objections were not proper as to the Intent-to-Enroll forms submitted for 26 students. And the District did not assert any objections to Intent-to-Enroll forms submitted for 72 students. Thus, there are Intent-to-Enroll forms for a total of 98 students that support Promise's Request for facilities—far less than its projections, and far less than any proffered methodology for its projections explains.

Because many of the District's stated objections were proper, Promise has not established its allegations that the District failed to articulate even a single lawful objection to its Request for facilities. Promise has thus not shown that the District was required to base its offer of facilities on the projections set forth in Promise's facilities Request under California Code of Regulations, title 5, section 11969.9, subdivision (d), or that it failed to perform a ministerial duty or abused its discretion so as to justify relief in traditional mandate.

Further, Promise does not present any evidence, or argument, showing that a projected in-district ADA of 168.26 (as set forth in its Revised Request) or 177.65 (as set forth in its earlier Request and the Amended Petition) is reasonable given its asserted methodology and the fact that ultimately, its request is supported by Intent-to-Enroll forms for only 98 students. In its Amended Petition and moving papers, Promise merely asserts that "the Court has received Intent to Enroll forms for at least 142 in-District students meaningfully interested in enrolling at Promise Academy this Fall" or, alternatively, Intent-to-Enroll forms for 147 in-district students and, consequently, it provided the District "with enough to demonstrate that its projections are reasonable." (P's Mem. Ps. & As., p. 15:3-15; Am. Pet., ¶¶ 1a-6a.) Because Promise has not attempted to show that a projected in-district ADA of either 168.26 or 177.65 is reasonable even if its facilities request is supported by Intent-to-Enroll forms for a significantly lesser number of students, it has not demonstrated that it is entitled to the specifically requested relief.

For the first time in its supplemental briefing, Promise contends that the Court "can order that the District revise its Final Offer to be based on a lower in-District ADA projection if the Court finds the documentation submitted by Promise does not adequately support its initial in-District ADA projection of 177.56." But Promise fails to explain how the Court could reasonably do so. For example, and as explained, when the Intent-to-Enroll forms are facially inspected, it becomes apparent that there are sufficient forms for only 98 students because the District's objections to forms for 89 students were well taken. Promise has not presented any argument or evidence showing how the Court would determine what a reasonable in-district ADA projection would be when Promise has provided Intent-to-Enroll forms for only 98 students. Absent such argument and evidence, the Court would have to engage in speculation to determine whether Intent-to-Enroll forms for 98 students would support a certain projected in-district ADA. And Promise argues for none other than its initial in-district ADA projection of 177.56.

V. *Disposition*

Under attack here is the District's December 1, 2018 response and objections to Promise's Revised Request for facilities for the 2019-2020 school year. But Promise has not shown that under the governing law, the District's actions were arbitrary, capricious, lacking in evidentiary support, or were made without due regard for Promise's rights, or that the District did not adequately consider all relevant factors, or demonstrate a rational connection between those factors, the choice it made, and the purposes of the enabling statute and regulation. Thus, Promise did not demonstrate its entitlement to the specific relief in mandate it seeks, or a basis for any other lesser or different relief. Its Amended Petition is accordingly denied. Counsel for the District is directed to prepare a form of proposed judgment, submit the same for counsel for Promise for approval as to form, and submit the same to the Court in a Word document to

Department10@scscourt.org within 10 days. If the parties cannot agree as to the form of the judgment, each side is to submit its own version within the same period of time.

IT IS SO ORDERED.

August 15, 2019

Hon. Helen E. Williams
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA

DOWNTOWN COURTHOUSE
191 NORTH FIRST STREET
SAN JOSÉ, CALIFORNIA 95113
CIVIL DIVISION

FILED
AUG 15 2019
Clerk of the Court
Superior Court of CA, County of Santa Clara
BY _____ DEPUTY
I. ARMENTA

RE: **Promise Public Schools, Inc vs San Jose Unified School District**
Case Number: **18CV340197**

PROOF OF SERVICE

ORDER DENYING PETITION FOR WRIT OF MANDATE was delivered to the parties listed below the above entitled case as set forth in the sworn declaration below.

If you, a party represented by you, or a witness to be called on behalf of that party need an accommodation under the American with Disabilities Act, please contact the Court Administrator's office at (408) 882-2700, or use the Court's TDD line (408) 882-2690 or the Voice/TDD California Relay Service (800) 735-2922.

DECLARATION OF SERVICE BY MAIL: I declare that I served this notice by enclosing a true copy in a sealed envelope, addressed to each person whose name is shown below, and by depositing the envelope with postage fully prepaid, in the United States Mail at San Jose, CA on August 15, 2019. CLERK OF THE COURT, by Ismael Armenta, Deputy.

cc: Sarah Jean Kollman 701 University Ave Ste 150 Sacramento CA 95825
John Yeh 1503 Grant Road suite 200 Mountain View CA 94040